

<sup>2</sup> The Board notes that on appeal appellant submitted new evidence. The Board's jurisdiction is limited to the review of evidence which was before OWP at the time it issued its final decision. Therefore, the Board is unable to review this evidence on appeal. See 20 C.F.R. § 501.2(c)(1).

### **FACTUAL HISTORY**

On December 20, 2014 appellant, then a 43-year-old city carrier, filed a traumatic injury claim (Form CA-1) alleging that on that same date he sustained a knee and back injury. He reported that he was descending a ramp with a hamper and attempted to keep the hamper from tipping over. Appellant sought treatment on the date of injury. On the reverse side of the form the employing establishment controverted the claim.

On December 20, 2014 Dr. Jack Feldsher, a Board-certified osteopathic physician with Irwindale Industrial Clinic, diagnosed thoracolumbar strain and left knee strain. Appellant was released to work immediately with no work restrictions.

By letter dated December 30, 2014, OWCP informed appellant that the evidence of record was insufficient to support his claim. It informed him that the employing establishment had challenged the merits of the claim and that further factual information was necessary. OWCP provided appellant with a questionnaire, and requested additional factual and medical evidence. Appellant was afforded 30 days to submit the additional evidence.

In support of his claim, appellant submitted medical reports and duty status reports (Form CA-17) dated December 20, 2014 through January 20, 2015. He did not submit answers to the OWCP questionnaire regarding the requested factual information.

On January 27, 2015 a special agent with the employing establishment's Office of Inspector General (OIG) submitted an investigation report for the period December 30, 2014 through January 27, 2015 with supporting documentation. The investigation concluded that appellant did not report that he had an injury when it occurred, but waited approximately three hours to report the injury. When interviewed by OIG, appellant related that he did not think the injury he suffered was serious enough to file a Form CA-1. Appellant reported that on the day of injury, he was treated at a clinic and released to full duty yet did not return to work. The report noted that appellant refused to provide a sworn statement to OIG. Further investigation revealed a video recording from the employing establishment's security camera on the date of appellant's injury. It showed appellant talking with coworkers and T.G., supervisor of customer service. In the video, appellant was carrying a gallon of water and walking without assistance. Following his conversation with T.G., he was transported to the clinic. Numerous witness interviews were conducted. OIG reported that many of these witnesses indicated that appellant let the hamper go and it tipped over, but that they did not see him fall or injure himself. T.G. stated that she did not think appellant sustained an injury because he informed her he let the hamper go so that he would not get injured.

By decision dated February 12, 2015, OWCP denied appellant's claim finding that the evidence failed to establish that the incident occurred as alleged. It noted that appellant had failed to establish fact of injury because, although the hamper full of mail tipped over, there was no evidence that he was injured in the process. Witness statements contradicted his allegation.

On March 9, 2015 appellant requested an oral hearing before an OWCP hearing representative.

At the October 14, 2015 hearing, appellant explained that he was pushing the hamper down the ramp when he hit a pothole on a ramp and the hamper turned over. He tried to hold the hamper back but it was too heavy so he let it go. Appellant noted that the hamper weighed about 200 pounds. After the hamper tipped over, his coworkers helped him pick up the mail and position the hamper upright. Appellant reported that he went on to deliver his route but did not develop pain until later that day. He stated that he immediately reported the incident to his supervisor but did not tell her he was injured until later that day when he began to experience pain. Appellant sought medical treatment on the date of injury and was diagnosed with a back and knee sprain. Although he was released to return to work, appellant stated that he was not feeling well and went home. Appellant reported that his condition continued to worsen over the weekend and after seeking treatment with his primary physician on the following Monday, he was diagnosed with a torn meniscus and back sprain. He testified that he had no prior back or knee injuries. Appellant explained that, at the base of the ramp, his wheel got caught in the pothole, causing the hamper to tip over. He stated that he was still under medical care and was working four hours per day. The record was held open for 30 days.

In support of his claim, appellant submitted medical reports and duty status reports (Form CA-17) dated December 20, 2014 through October 22, 2015 documenting his medical treatment. He also submitted a copy of his February 23, 2015 response to the 87 questions posed by OIG detailing the circumstances surrounding the employment incident.

A union grievance was submitted noting that appellant was issued a 14-day suspension for unacceptable conduct/misrepresenting his medical condition. The union representative disputed the suspension and argued that appellant's allegations correlated with the facts and circumstances surrounding the case. He identified violations made by the employing establishment and requested the suspension be rescinded and expunged due to lack of evidence and overwhelming contradictions.

A March 20, 2015 shop steward statement was also submitted noting violations by the employing establishment and OIG in handling appellant's claim. He too recommended the suspension be expunged due to lack of evidence and the overwhelming contradiction to management's claims.

In an April 2, 2015 witness statement, J.M., a fellow coworker, reported that he witnessed the employment incident when appellant was coming down the ramp area and struggled to maintain control of his gurney. He lost control of the hamper and it completely flipped over at the bottom of the ramp. J.M. reported that he and two other carriers helped appellant collect the mail off the floor. He noticed appellant grabbing his back and wincing in pain, stating that at no time did appellant attempt to help retrieve the scattered mail.

In an April 2, 2015 witness statement, E.D., a fellow coworker, reported that he witnessed appellant trying to hold up his hamper while it was falling over. He went to help appellant pick up the mail. E.D. did not see him bend over to pick up any mail and noticed him grabbing his sides and hips.

By letter dated November 24, 2015, the employing establishment noted review of the hearing transcript and argued that appellant's testimony was contradictory to his responses

following the injury. It continued to controvert the claim and noted that appellant was issued a disciplinary action for falsely reporting an injury based on the OIG investigation.

By decision dated December 28, 2015, OWCP's hearing representative affirmed the February 12, 2015 decision finding that the evidence failed to establish that the incident occurred as alleged. The hearing representative noted that, due to conflicting factual evidence and several discrepancies surrounding the alleged event, the evidence was insufficient to establish the factual portion of the claim.

On February 1, 2016 appellant requested reconsideration of the December 28, 2015 decision. He stated that he was resubmitting his physician's initial orthopedic consultation and evaluation report. In support of his claim, appellant submitted numerous medical reports previously of record.

By decision dated May 25, 2016, OWCP denied appellant's request for reconsideration finding that he neither raised substantive legal questions nor included relevant and pertinent new evidence establishing fact of injury.

### **LEGAL PRECEDENT**

To require OWCP to reopen a case for merit review under FECA section 8128(a), OWCP regulations provide that the evidence or argument submitted by a claimant must: (1) show that OWCP erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by OWCP; or (3) constitute relevant and pertinent new evidence not previously considered by OWCP.<sup>3</sup> Section 10.608(b) of OWCP regulations provides that when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(3), OWCP will deny the application for reconsideration without reopening the case for a review on the merits.<sup>4</sup>

### **ANALYSIS**

The Board finds that the refusal of OWCP to reopen appellant's case for further consideration of the merits of his claim, pursuant to 5 U.S.C. § 8128(a), did not constitute an abuse of discretion.

The issue presented on appeal is whether appellant met any of the requirements of 20 C.F.R. § 10.606(b)(3), requiring OWCP to reopen the case for review of the merits of the claim. In his application for reconsideration, appellant did not show that OWCP erroneously applied or interpreted a specific point of law, and he did not advance a new and relevant legal argument not previously considered. He continued to allege that his injury was employment related, however, he presented no point or law or no new legal argument as to why the evidence of record established that the incident occurred as alleged. Consequently, appellant is not entitled to a

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<sup>3</sup> *D.K.*, 59 ECAB 141 (2007).

<sup>4</sup> *K.H.*, 59 ECAB 495 (2008).

review of the merits of his claim based on the first and second above-noted requirements under section 10.606(b)(3).<sup>5</sup>

The Board further finds that appellant did not submit relevant or pertinent new evidence not previously considered by OWCP. The underlying issue on appeal involved fact of injury; whether the incident occurred at the time, place, and in the manner alleged within the performance of duty. Appellant's reconsideration request does not provide greater detail pertaining to whether the incident occurred in the manner alleged. Rather, he resubmitted medical reports previously of record. The Board notes that this evidence was previously submitted and considered. Material which is duplicative of that already contained in the case record does not constitute a basis for reopening a case.<sup>6</sup>

A claimant may obtain a merit review of an OWCP decision by submitting relevant and pertinent new evidence. In this case, appellant failed to submit any relevant and pertinent new evidence addressing that the December 20, 2014 employment incident occurred as alleged.

The Board accordingly finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(3). Appellant did not show that OWCP erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by OWCP, or submit relevant and pertinent new evidence not previously considered. Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

### **CONCLUSION**

The Board finds that OWCP properly refused to reopen appellant's case for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

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<sup>5</sup> 20 C.F.R. § 10.606(b)(3).

<sup>6</sup> See *Kenneth R. Mroczkowski*, 40 ECAB 855 (1989).

**ORDER**

**IT IS HEREBY ORDERED THAT** the May 25, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 7, 2017  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge  
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge  
Employees' Compensation Appeals Board